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Current Topics.

POOR PERSONS' CASES.

THE fifteenth annual report of the Council of the Law Society on the work of the Poor Persons Committees of the society and the provincial societies mentions the difficulties that have arisen owing to the war of finding a sufficient number of solicitors and counsel to conduct poor persons' cases in the High Court and the Court of Appeal. As regards counsel, some deferment of the problem is available by reason of the fact that during the currency of the Courts (Emergency Powers) Act, 1939, pleadings in poor persons' matrimonial causes need not be settled by counsel. The recent statement by the Attorney-General in the House of Commons that he is considering the problem in consultation with the Bar Council will do much to allay anxiety. Not all the ninety-five committees that have been formed were operating during the year under review. One-fifth of them report that the number of applications was substantially the same as during the previous year. About two-fifths state that there has been an increase of applications, in some cases a substantial increase. The other two-fifths report a decrease. A considerable part of the increase was due to the new grounds for divorce created by the Matrimonial Causes Act, 1937. Perjury occasionally occurred in the applicant's statutory declaration either as to his or her own adultery or as to his or her means. Precautions were taken to prevent this, but, when necessary, cases were referred to the Director of Public Prosecutions. Beside the shortage of counsel there was also an acute shortage of solicitors and skilled clerks and this had the inevitable result of considerable delay in some cases, as appeared from the reports of a large number of the committees. As to this, the Ministry of Labour's recent assurance to the Council of The Law Society that solicitors and their clerks doing necessary work in solicitors' offices would not be called upon under the Registration for Employment Order to do industrial work, if fully employed in their profession, together with the deferment procedure for military service now in operation, gives ground for hoping that the position will not deteriorate. In face of all the obstacles at present in the way of expeditiously carrying out the work of the committees it is evidence of their zeal that over half of them are able to report that they were able to deal with their work with the same expedition as before the war.

FIRE SERVICES (EMERGENCY PROVISIONS) ACT, 1941.

THE speed with which the Fire Services (Emergency Provisions) Act, 1941, passed through all its stages in both Houses was fully called for by the circumstances, but is none the less a matter for congratulation. On 14th May it was read a first time, the second reading, report stage and third reading were begun and completed on 20th May, on 21st May it passed through all its stages in the Lords and on 22nd May it received the Royal Assent. There are still certain outstanding problems which do not appear to come within the scope of the regulations. One of these is the question of military co-operation in what, on the Home Secretary's own statement in his speech moving the second reading, is a military operation. Another and equally pressing problem is that arising with regard to the street fire patrols and their relation to the fire brigades after the passing of the Act, which takes the fire brigades from the local authorities. It seems clear from the terms of the Act and the Schedule that for the present, at any rate, it is not intended to make regulations under the Act dealing with problems of fire watching and fighting other than those arising immediately out of the proposed condensation of the 1,400 fire brigades in the country to less than fifty large brigades, their transference from the local authorities to the regional commissioners, the formation of regional reserves of full-time paid workers and equipment, and the strengthening of the Fire Division of the Home Office. The making of regulations under s. 1 (1) of the Act and the Schedule is without prejudice to the generality of the power of the Secretary of State to make regulations for any other matters which appear to him to be necessary or expedient to be provided for with a view to improving the arrangements for fighting fires. The fact that the inadequacy to the needs of the situation of the present orders relating to fire watching is present to the mind of members was apparent during the course of the debate, and the impossibility of making further drastic compulsory calls on the civil population already engaged on fire watching was emphasised by the amendment to para. 5 of the Schedule—carried on the third reading—which preserved the safeguard of part-time and unpaid personnel from liability to be transferred for service from one area to another. There is no doubt that the problem of empty houses and unprotected business premises is one which needs careful and urgent attention.

ALLIED POWERS (MARITIME COURTS) ACT, 1941.

A MASTERLY survey of the provisions of the Allied Powers (Maritime Courts) Act, 1941, was given by the Lord Chancellor on the motion for its second reading in the House of Lords on 21st May. He said it was a measure of considerable importance, novelty and urgency. It authorised the Allied Governments who are now finding refuge in this country to set up inside their own borders their own Maritime Courts, staffed by their own judges. These courts would have jurisdiction to deal with certain maritime offences—in brief, offences committed by any person on board a merchant ship of that Power, though it might be quite a serious crime; secondly, offences committed by the master and members of the crew of a merchant ship of that Power in contravention of the merchant shipping law of that Power; and, thirdly, offences committed by a person who is a national of that Power and a seafaring person in contravention of the Mercantile Marine conscription law of that country. The measure did not, his lordship said, enable the Allied Courts to deal with British subjects. The Bill contained machinery by which, in any case of challenge and doubt, the question whether an individual was or was not a British subject, and therefore outside the Bill, could be determined by a local tribunal. The answer to the question whether all would necessarily know that they have this privilege was that when any process was served upon them summoning them to appear before an Allied Court, they would be informed on the face of the notice that if they claimed to be British subjects they were not under the jurisdiction of the court, and if they wanted to have the matter determined that was the procedure by which to do it. Then there was the question how anybody could be brought before those courts. That must be done through the ordinary machinery of a British justice of the peace. To him there would be application for a summons, or in case of need of a warrant, and he would act as he did in a criminal charge. He would grant a summons or a warrant and the individual would be brought before the court. The Allied Courts had powers of finding persons guilty and sentencing them, but the only persons authorised to carry out the sentence would be British officials. There would also be proper consideration of the question of the application of mercy. The question of whether an Allied Court had exceeded its jurisdiction could be determined by our own High Court. The measure would be retrospective as to offences committed within the six months prior to the passing of the Act. The Bill was then read a third time and passed, and it received the Royal Assent on the following day.

WAR DAMAGE ACT AND INSURANCE COMPANIES.

In a written answer to a question by Mr. Woodburn in the House of Commons on 20th May, the President of the Board of Trade stated that the Fire Insurance Companies and Lloyd's had, in the national interest, agreed to undertake the task of acting as agents of the Government for the War Damage Act on a basis of remuneration so calculated as to cover the costs of administration without profit to themselves. The work, he said, would be performed along with and as part of the ordinary work of the companies, and in those circumstances it could not be treated as arising out of a contract so as to render necessary the application of the Fair Wages Clause to the conditions of workers employed by the companies. He took the opportunity of expressing the Government's appreciation of the public spirit shown by the insurance organisations and their staffs in carrying out the onerous duties placed upon them in connection with both the War Risks Insurance Act and the War Damage Act. That those duties are indeed onerous is apparent from the most cursory examination of the relevant sections of the Act and the Regulations dealing with the Business Scheme and the Private Chattels Scheme. Power is given to the Board of Trade under s. 59 to operate the schemes, and under s. 69 it may employ agents for such remuneration (if any) as the Board may with the approval of the Treasury determine, payment of expenses approved by the Board and the Treasury being also defrayed by the Board. The interposition of the words "if any" after "remuneration" seems to indicate that there was something more than a hope before the passing of the Act that the companies would forgo profit on the great public work which they have undertaken. The payment of the costs of administration cannot take into account the increased strain on both management and staffs of learning and working new and complicated insurance schemes which are subject to new and complicated laws. Such difficult matters as the insurability or otherwise of different classes of goods, or the calculation of the exact sum up to which a farmer must insure under the business scheme, necessitating as they do a close examination of lengthy provisions of the Act and the Regulations, will gradually become matters of basic routine knowledge to management and staffs of the companies, but in the meantime there must be a transitional period of strain, which can only be partially eased by frequent resort to professional legal advisers. Under those circumstances the conduct of the insurance companies in forgoing remuneration for this extra work is all the more creditable.

DOCTRINE OF FRUSTRATION.

A matter which is always topical in time of war to those practising in the courts is the frustration of contracts. It will be recalled that in May, 1939, the Law Revision Committee made certain recommendations on this subject. They suggested that money already paid under a frustrated contract should be recoverable and the rule in *Chandler* v. *Webster* [1904] 1 K.B. 493 repealed, but that a deduction should be made of such sum as represented a fair allowance for expenditure incurred by the payee in the performance of or for the purpose of performing the contract. It was also proposed that when part of the frustrated contract had been performed at the moment of frustration, the price paid or payable under the contract for the part which had been performed should not be varied. For the purpose of the recommendations no regard was to be had to amounts receivable under any contract of insurance. On 20th May Sir H. Williams asked the Attorney-General in the House of Commons whether his attention had been drawn to these recommendations and whether, in view of the recommendation of the Committee that an appropriate proportion of a premium on an unexpired frustrated policy should be refunded, he would take steps to put the recommendation in force. The Solicitor-General replied that legislation on the lines of the Report was in contemplation when war broke out. Since then legislation had been directed to war problems and some of this legislation, e.g., the Landlord and Tenant (War Damage) Act, 1939, dealt with a somewhat similar issue to that raised by frustration. He pointed out that if the Committee's proposals were adopted they would effect a general alteration of the Common Law. The Government were, however, reconsidering the matter to see whether it would be right to submit a Bill to Parliament on the lines of the Committee's Report. The recommendations, he added, were not, of course, confined to contracts of insurance, and undoubtedly required reconsideration in the light of the interference with contracts which war conditions bring about. It might usefully be added that the unexpected contingencies of total war, and its widespread incidence, make the adjustment of the law to common sense one of particular urgency.

CORONERS' INQUESTS: ADMISSION OF PRESS.

In a Current Topic on the subject of the admission of the public to coroners' inquests in our issue of 12th April, 1941 (*ante*, p. 170), we recorded the recent resolution of the Institute of Journalists "energetically protesting against the exclusion of the Press from proceedings in coroners' courts concerned with the presumption of death under reg. 30A of the Defence (General) Regulations, 1939." We referred to Lord Tenterden's classic statement of the law on the admission of the public to coroners' inquests in *Garnett* v. *Ferrand* (1827), 6 B. & C. 576, that the coroner and the coroner alone was to decide who was to be excluded from inquests. Regulation 30A expressly provides that unless on the application of the coroner the Secretary of State otherwise directs, the inquiry must be in private. The reason for this provision, as stated in our previous Current Topic on the subject, may well be that proceedings under reg. 30A can be compared with those before a master or judge when deciding matters preliminary to more important proceedings. The Institute of Journalists has now followed up its resolution by sending a deputation to the Home Office, which was received on 20th May by Mr. Osbert Peake, Parliamentary Under-Secretary to the Home Office. The chairman of the executive committee of the Institute told Mr. Peake that the fact that presumption proceedings in the High Court had always been public quite clearly demonstrated that the principle of open hearing and reporting of such cases was approved by the judicature. It was inevitable, he stated, that the suppression of the facts would tend to breed local suspicions, and lead to the circulation of rumours and insinuations. The honorary treasurer of the Institute said that the representations were made largely in the interests of the local newspapers, which had close concern and intimacy with coroners' courts, and to which the regulation they were protesting against was a matter of great importance. Mr. Peake assured the deputation that he would convey their representations to the Home Secretary and Minister of Home Security. There may well be excellent reasons of national security in securing the privacy of such proceedings in certain cases, but whatever the rights or wrongs of the matter, whether in relation to the public or the Press, the Institute now has the assurance of the Home Office that the matter will be reconsidered in all its bearings.

POST-WAR PLANNING.

The National Federation of Property Owners issued on 9th May a second memorandum on the wider aspects of the terms of reference of the Ministry of Works and Buildings Expert Committee on Compensation and Betterment, particularly on State purchase of development rights and the Lex Adickes and other schemes of land redistribution. The Federation had already submitted to the Expert Committee in its letter of 10th March, 1941, the opinion that replanning and reconstruction should be on a national basis and the existing compensation laws should be co-ordinated, and later submitted a memorandum on the question, *inter alia*, of the linking up of town planning schemes with a national scheme. The Federation realises that the devastation caused by the war calls for the quickest and simplest method of replanning and reconstruction, though in normal times it would adhere to its belief in private enterprise. On the other hand it expresses disapproval of the scheme for the acquisition by the State of the development rights of undeveloped land, and sets out a number of reasons for its disapproval, among these being that it would mean the nationalisation of a part of an owner's interest in land, and thus strike at the very root of the principle of private enterprise in property. It would enable the State to acquire development rights over large rural areas without compensation and develop parts of such areas by the creation of townships to the detriment of the amenities of adjacent properties. Further it would mean that the right type of development would suffer by the exclusion of the individual owner whose knowledge of local conditions is at present of inestimable value to the proper development of his land. The Federation reaffirmed its approval of the principle of pooling land for re-development where for major considerations of town-planning it was not possible for owners to rebuild on their own sites, with the reservations that compensation should be based on values prevailing on 31st March, 1939, and that displaced owners should be given the opportunity of re-purchase where possible. The memorandum adds that the procedure laid down by the Town and Country Planning Act, 1932, was so dilatory and cumbersome that many plans for land ripe for development were held up for a number of years. The fear of claims for compensation for injurious affection had prevented local authorities from proceeding with schemes, and this difficulty would be removed by the exercise of town planning powers by a National body. The co-operation and constructive criticism of the Federation and of individual property owners is a welcome feature of the planning which is now in process of beginning for post-war development.

RECENT DECISIONS.

In *In the Estate of Robinson, G., deceased*, on 20th May (*The Times*, 21st May), Langton, J., admitted to probate a photostatic copy of a will, authenticated by a Swiss magistrate, until the original could be brought in. The original will was in the magistrate's office at Lausanne and owing to the disturbed condition of Europe it had not been considered safe to send it here.

In *J. Wharton (Shipping), Ltd.* v. *Mortleman and Another* on 14th May (*The Times*, 15th May), the Court of Appeal (MacKinnon and Luxmoore, L.JJ., and Stable, J.) held, dismissing an appeal from the Lord Chief Justice, that the "Alderpool" a merchant ship which at the time of an accidental collision by it with the "Brandonia," a cargo vessel which it sank, had been requisitioned for military service and was proceeding to Southampton for orders, was not carrying out a "warlike operation" within the terms of the insurance policy covering the "Brandonia."

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Criminal Law and Practice.

EVIDENCE IN MITIGATION OF SENTENCE.

ACCORDING to a report in a daily paper, in *R.* v. *Eve* at Salisbury Assizes, on 22nd May, 1941, Charles, J., ordered that the defendant should receive twelve strokes of the birch and sentenced him to twelve months' imprisonment on charges of robbery with violence. The accused had apparently pleaded "not guilty" and been found guilty. The interesting feature of the case, from the purely legal point of view, is that if the report is correct, Charles, J., refused to hear evidence of good character offered by an officer in the R.A.F., in which the accused was a corporal.

To begin with, there are a number of early cases which make it clear that whatever be the law about sentences for other offences, sentences for offences for which corporal punishment is awarded cannot be pronounced in the absence of the accused, *R.* v. *Harrison and Duke* (1697), 12 Mod. 156. In another old case the court went further, and enunciated principles which clearly must commend themselves to those engaged in modern criminal administration. The case (*R.* v. *Hann & Price* (1765) 3 Burr., 1787) was a motion for a rule to dispense with the attendance of two justices (who were charged with refusing a licence out of pique and bad motives), on the undertaking of their clerk in court "to answer for their fines." The court, after full debate, were unanimous in refusing the motion. They saw the offence in so atrocious a light as to be far from determining that the punishment would only be pecuniary. While it was in the discretion of the court either to grant or refuse the rule where it was clear and certain that the punishment would not be corporal, it ought to be denied in every case where it was either probable or possible that the punishment would be corporal. Two judges thought that even where the punishment would most probably be pecuniary only, yet in offences of a very gross and public nature (as they held this to be) the persons convicted should appear in person, for the sake of example and prevention of the like offences being committed by other persons. Thus it is clear that, particularly in the case of offences for which whipping may be ordered, the prisoner must be present on the occasion of his sentence.

R. v *Templeman* (1795), 1 Salk. 55 seems quite a sound authority for the proposition that where a person is found guilty he may put forward evidence in mitigation of the offence. It seems obvious, but apparently not so obvious that it cannot be disputed in specific instances, that evidence in mitigation must not include evidence as to matters which could have been adduced during the trial. *R.* v. *Lloyd* 4 B. & Ad. 135. On the other hand, it appears from *R.* v *Cox* (1831), 4 Car. & P. 539 that only in special circumstances would evidence in mitigation be admitted. This case, however, seems to turn on a special statute.

With regard to the prisoner's own evidence in mitigation, there cannot now be the slightest doubt of its admissibility. In *R.* v. *Wheeler*, 12 Cr. App. R. 159, the headnote states: "Evidence given between a plea of guilty and sentence is given at 'a stage of the proceedings' within s. 1 of the Criminal Evidence Act, 1898." The appeal was against a conviction for perjury. The perjury was alleged to have been committed by the accused in the course of giving evidence on oath between his plea of guilty and sentence. It was argued on his behalf that the Act of 1898, which enabled a prisoner to be called, only enabled him to be called "at every stage in the proceedings," and the proceedings closed on a plea or finding of guilty. "It is very difficult to say," said Reading, L.C.J., "that in an enabling Act of this kind, the Legislature wished to prevent the prisoner giving evidence except at this particular time in all cases, or that he cannot go into the witness box after he has pleaded guilty. It would be a hardship to the prisoner. The only question remaining for our decision is whether evidence in mitigation of punishment is evidence given in a 'stage of the proceedings.' There is no doubt that it is." It seems logically to follow, that if it would be a hardship to a prisoner to be debarred from giving evidence in mitigation after a plea or finding of guilty and before sentence, it would be equally a hardship to be debarred from tendering such evidence.

This is borne out by a more general statement by Alverstone, L.C.J., in delivering the judgment of the court in *R.* v *Weaver*, 1 Cr. App. R. 13. He said: "The long established practice cannot be altered, except by the Legislature. In considering sentences it has been the invariable practice to inquire into the prisoner's history, in his own interest, and, if in the course of that inquiry facts come out which damage him, the judge ought to take notice of it." It follows that it would be irregular for a judge to exclude any evidence after plea or finding of guilty which might throw light on the prisoner's history, as that would operate against the prisoner's interests.

All this does not mean that a judge may not be perfectly justified in excluding irrelevant witnesses in individual cases, but if he has any good reason for excluding a witness he should state what it is publicly, for in the criminal courts more than anywhere else it is important "that justice should not only be done, but should be manifestly seen to be done."

Liability of Public Authorities for Non-Feasance.

PUBLIC and semi-public bodies now exercise so many functions under statute that claims against them based on the terms of a statute and not on the common law are becoming increasingly frequent. In such cases what the plaintiff complains of is often some omission or inactivity, as distinct from positive wrongdoing, on the part of the statutory authority. The decision in December of last year of the House of Lords in *East Suffolk Catchment Board* v. *Kent* (57 T.L.R. 199) has a bearing on the decisions of the Court of Appeal in three cases concerned with the alleged liability of local authorities to minimise the effect of the blackout on street obstructions. The House of Lords stressed the vital distinction between statutory powers and statutory duties. This distinction is easier to enunciate than to apply.

STATUTORY POWERS.

The principle is that a public body which owes no duty to render a service does not become liable at the suit of an individual for failing to render reasonably adequate and efficient service which it has been given statutory power to render, even if the public body takes it upon itself to render some service. In the *East Suffolk Catchment Board case* the board had power under the Land Drainage Act, 1930, to protect low-lying land from encroaching tidal rivers but it had no duty of protection. The tides caused breaches in a river wall with the result that floods covered Kent's land; the board elected to exercise its statutory powers by beginning to execute repairs but carried out the repairs so inefficiently that the breaches in the wall were not closed for nearly six months, whereas they could reasonably have been closed in a fortnight. The action for the extra damage done by the floods because of this delay failed. Lord Thankerton pointed out that the board had a discretionary power to abandon their operations, a power which was in marked distinction to the case of a positive statutory duty to undertake the repair and to the case of a contractual undertaking to do the work. On the evidence, it was clear that the board had not shown diligence either as to the speed or the nature of the measures they took. The gist of the decision was expressed by Lord Romer as follows: "Had the Land Drainage Act, 1930, imposed upon the appellants the duty of repairing the wall, instead of merely conferring upon them the power of doing so, they could, without question, have been made liable for this damage, for they would in that case have been under the obligation of effecting the repair with all reasonable skill and diligence, and they would have committed a breach of such obligation had there been any unreasonable delay in effecting the repair. . . . However, the Act imposed upon the appellants no duty of repairing the wall. It merely gave them the power of doing so. Whether or no they should exercise that power was a matter entirely within their own discretion."

To be distinguished from the type of case in which the defendant is not liable because he is justified in being entirely passive, is that in which he does purport to exercise his statutory power but does not exercise it properly, thereby causing damage. There is here liability under the statute. For example, if the board in the above case had entered on the respondent's land and increased the flooding through inefficient work on the land there would have been liability. This type of case is illustrated by *Manley* v. *St. Helen's Canal and Railway Co.* (1858), 2 H. & N. 840, where there was a statutory power to make and maintain a sufficient swivel bridge over a canal. The plaintiff recovered damages for injuries caused by falling through a gap in the highway over the swivel bridge caused by opening it for traffic. As the bridge was defective it was not a work expressly authorised or sanctioned by the Legislature; there was no statutory defence. The limits of this decision were explained by Lord Parker of Waddington in *Great Central Railway* v. *Hewlett* [1916] 2 A.C. 511: "The case cannot be used as an authority for the proposition that a mere power to maintain what the Legislature has expressly sanctioned involved any obligation towards the public." His Lordship was delivering judgment in the leading case on accidents in the blackout in the last war, a case which has been followed by the Court of Appeal in this one.

It is clear that the objects (street refuges and a sandbin) which the plaintiffs collided with in the recent blackout cases were erected under statutory sanction and that the local authorities who were sued could have done something to reduce the risk of collisions by supplying the limited illumination allowed by the lighting regulations or by using white paint. In *Greenwood* v. *Central Service Co.* [1940] 2 K.B. 447 (C.A.), and *Wodehouse* v. *Levy* (*ibid.*, 561, C.A.) it was accepted that the Metropolis Management Act, 1855, imposes a duty on, and not merely gives a power to, local authorities in London to cause sufficient lamps to be lighted in the streets during darkness. But the Lighting (Restrictions) Order prohibited lights to be shown, including street lamps. It was, however, expressly stated that the prohibition should not apply to certain lights, including lamps indicating obstructions upon the carriageway not exceeding one candle power and screened. There was held to be no liability under the Act of 1855 because the statutory duty had been completely abrogated by the Lighting Order and hence there had been a mere failure to exercise a statutory power, as in *East Suffolk Catchment Board* v. *Kent*, though that case was not

referred to in any of the blackout cases in the Court of Appeal. As Lawrence, L.J., said in *Wodehouse* v. *Levy* (p. 566): "It is true that the provisions of that Order fully empower certain lights to be used, but these powers are permissive only and do not affect the abrogation of the borough council's liability to keep its streets well and truly lighted." On the wording of the Lighting Order, it would not appear to have been difficult to interpret it as only curtailing, not abrogating, the statutory duty of proper lighting, thus leaving the supplying of the lawful glimmer as a matter of continued duty, not as a matter of new power. But this was not the view taken by the Court of Appeal.

The decision in *Lyus* v. *Stepney Borough Council* [1941] 1 K.B. 134 (C.A.) raises less difficulty, for there was no question of a statutory power to reduce the danger of the blackout, still less of a statutory duty. It was held that there was no duty on the defendant council to paint a white mark on a sandbin lawfully erected in the street; the council merely had a power to take such a step in the sense that such activity would not be *ultra vires*. In other words, there was held to be no common law duty of taking reasonable care to prevent the bin from becoming a danger. The gap left by the abrogation of the statutory duty was not filled by common law negligence.

This being so, what is the authority of the decisions in *Baldock* v. *Westminster City Council* (1918), 88 L.J.K.B. 502, and *Polkinghorn* v. *Lambeth Borough Council* (1938), 54 T.L.R. 345 (C.A.), which the Court of Appeal has refrained from expressly disapproving? By way of distinction, Luxmoore, L.J., said in *Wodehouse* v. *Levy* (p. 568): "In the present case the Borough Council had never previously to the accident illuminated the obstruction in question, and, therefore, had not become subject to any self-imposed duty to keep it illuminated," as he said was the case in the *Polkinghorn* decision. In the blackout cases the accident occurred in the very early days of the war before the defendants had taken precautions permitted, but not ordered, to be taken, or at least before the presence of these limited precautions had time to become a matter of common expectation. The suggestion seems to be that if a public authority chooses to exercise a power it may be liable at common law for not continuing to exercise it when the plaintiff has reasonably come to rely on the fulfilment of the power; provided, naturally, that he has suffered new damage thereby, as in a collision, and not merely continued to suffer from previous damage not originally caused by the defendant, as in the *East Suffolk Catchment Board* case.

But it would seem to be unsafe to rely on this suggestion of Luxmoore, L.J., for it seems to conflict with *Sheppard* v. *Glossop Corporation* [1921] 3 K.B. 132 (C.A.), which was not referred to in the blackout cases, but which was expressly approved of and followed by the House of Lords in *East Suffolk Catchment Board* v. *Kent*. On the facts of the case the defendant authority was empowered but not bound to light a particular road which had not become repairable by them as highway authority; they did light the road but extinguished the lamps at an early hour for the purpose of economy, without warning. The plaintiff using the road at a later hour when the lamps were normally lighted, was injured as a result of the darkness; he failed to recover damages. The extent of the so-called "self-imposed duty" when there is no statutory duty is therefore obscure.

STATUTORY DUTIES.

When a duty is imposed on a public body by statute it does not follow that there will be a civil remedy for damage caused through non-compliance with the duty. There may be some other remedy or it may not be the intention of Parliament to establish civil liability. Thus, in *Atkinson* v. *Newcastle & Gateshead Waterworks Co.*, 2 Ex. D. 441 (C.A.) the plaintiff's house was burnt down because of the failure of the defendants to perform the duty which had been laid upon them by statute to maintain a certain pressure of water in their water pipes for the purpose of extinguishing fire; the defendants were not liable as the statute imposed criminal liability by fine and it was held that Parliament did not intend to give any additional remedy by way of damages. In *Saunders* v. *Holborn District Board of Works* [1895] 1 Q.B. 64, the plaintiff had no action against a local sanitary authority for injuries caused through its failure to perform its statutory duty of removing snow from the streets.

It is on the strength of decisions such as this that Scrutton, L.J., enunciated the misleading principle that "the general rule is that a local authority is liable for misfeasance but not for non-feasance," (*Hesketh* v. *Birmingham Corporation* [1924] 1 K.B., at p. 271). If this is a general rule it is one which has been almost smothered by exceptions; or rather, the question of liability depends so much on statutory interpretation that there does not, unfortunately, appear to be any general rule. But it is certain that local and other public authorities have often been made liable for non-feasance of statutory duty. In *Read* v. *Croydon Corporation* [1938] 55 T.L.R. 212, the Waterworks Clauses Act, 1847, s. 53, imposed on the defendants the duty of supplying pure water for domestic purposes to the occupiers of dwelling-houses. In supplying typhoid-infected water there was, on the facts, negligence, but Stable, J., also held that there was liability under the Act for the non-supply of pure water to the plaintiff occupier; the plaintiff's daughter who was not an occupier had to rely solely on common law negligence. But Stable, J. thought that even the occupier of the house would have had no remedy even under the statute if all due care had been taken, because the statute did not impose an absolute liability. It is recognised to be a difficult question of construction whether the liability for neglect of a statutory duty is absolute or depends on wrongful intent or negligence. It was said in *Carpenter* v. *Finsbury Borough Council* [1920] 2 K.B. 195 that s. 130 of the Metropolis Management Act, 1855, which requires local authorities in London to cause sufficient lamps to be lighted during hours of darkness imposes an "absolute duty" to light the streets. According to the well-known statement of Brett, L.J., in *Hammond* v. *St. Pancras Vestry*, L.R. 9 C.P. 316, 322, the court will not uphold an absolute statutory duty unless the words of the statute clearly compel it to do so.

NEGLECT TO REPAIR HIGHWAYS.

A highway authority is, of course, not liable for its non-feasance in failing to perform its statutory duty to repair the roads which are under its charge. This anomalous rule which is capable of an historical explanation but not of a present-day justification, is frequently criticised in the courts. The modern decisions construe the rule of non-liability as narrowly as possible. First, they interpret the meaning of highway strictly, e.g., *Guilfoyle* v. *Port of London Authority* [1932] 1 K.B. 336 held that a swing-bridge was not in the ordinary sense a highway. Secondly, the successful defendant must be a highway authority in the strict sense (e.g., *Swain* v. *Southern Railway* [1939] 2 K.B. 561 (C.A.), and he sued in that capacity: in *Skilton* v. *Epsom & Ewell U.D.C.* [1937] 1 K.B. 112 (C.A.) the defendants' status as a highway authority did not prevent them from being liable in respect of non-repair of a traffic-stud which was placed on the highway under powers conferred by the Road Traffic Act, 1930. They were being sued in their capacity of controllers of traffic. Thirdly, the tendency is to attribute defective repair and non-repair to a misfeasance as contrasted with a non-feasance whenever it is possible to do so. *Newsome* v. *Darton U.D.C.* [1938] 54 T.L.R. 945 (C.A.) is a good illustration.

A Conveyancer's Diary.

"ADVANCES."

For some years past, with growing taxation, people have not been taking the classically austere view of spending capital. Very few would, I think, openly confess that it is proper to "live on capital," but almost everyone takes a laxer view than in the past of the degree of emergency which justifies an *ad hoc* use of capital. And in the last few months I have found myself dealing with a quite remarkably large number of cases where capital is to be used for one purpose or another that is not within the conception of an "improvement," or an "advancement" in the narrow sense in which the Victorian parent would have used that word.

From the conveyancing point of view these raids on capital can be of three kinds: (1) by an applicant entitled to an income interest; (2) by an applicant entitled to a capital interest, where the statutory power of advancement (*a*) does, (*b*) does not, apply. Actually I think the commonest case of all at the present day is a compound one; that is, where the life-tenant (usually a lady) and her children all want something, often for excellent reasons. Leaving aside settled land and fancy dispositions of personalty, I shall discuss these matters on the hypothesis of a perfectly ordinary settlement of personalty or of proceeds of sale of land, where there is a life-tenant who has a power to appoint capital among her issue subject to which power the fund is held for her children who attain twenty-one in equal shares.

Now the commonest case at present seems to be an application for, say, £100 each for the life-tenant and each of her two adult children for a more or less current purpose. Now obviously no ordinary power of advancement is any help here, and therefore the money which is wanted must be taken out of the settlement altogether. On the whole I think that it is not improper, *a priori*, for trustees to co-operate in such a plan, though every case must be judged on its merits. By showing a helpful spirit the trustees will retain the goodwill of the beneficiaries and will be able to keep control in the interest of the family as a whole (which is their truest duty). On the other hand, I think that trustees are fully justified in insisting at such a juncture on a cleaning-up, so far as practicable, of any muddles and irregularities there have been in the past. The transaction contemplated is an excellent opportunity for a deed of release and family arrangement such as a remarkable proportion of trustees seem to need.

The first important thing to be looked after is that the children shall be in a position to give an effective release and indemnity. So long as the power of appointment is outstanding and unexercised they are not so. The remainders at least in the sums to be released must therefore be indefeasibly vested. That can be done by an exercise of the power of appointment if the life-tenant is not to take part in the proposed share-out. If the life-tenant is to take part, the appointment would obviously be void as a fraud on the power, with obvious danger to the trustees. In that case the proper course is to leave the power of appointment released, there

being no doctrine of frauds on releases. The appointment, or release as the case may be, can be either in the whole fund or in a part. Which it is to be will depend on whether the life-tenant wants to retain any disposing power and also on the amount of money which a partial release would make available to secure any indemnity given to the trustees by the deed.

In a great many cases the life-tenant is restrained from anticipation, with the consequence that if £100 is allowed to her out of capital she is entirely incompetent to give a receipt for it. The only way in which the trustees can be safe in parting with capital in such a case is for them to get indemnities from the children and for the latter to charge their reversions with payment of all sums due under the indemnities.

A restraint on the life-tenant's interest is also awkward in that it makes it impossible for her to consent to the payment of capital to children by way of release, since she has no power to part with her life interest in any part of the fund. This problem, too, must be met by indemnities and charges on the part of the children, unless the statutory, or some other, power of advancement is available. It will be remembered that a married woman subject to a restraint on anticipation is capable of giving the consent made necessary under Trustee Act, 1925, s. 32 (*Re Garrett* [1934] Ch. 477).

The conveyancing instruments necessary for these transactions (except the exercise of a power of advancement, which needs no instrument) are as follows: in every case, first, a deed releasing or exercising the power of appointment—exercising it, of course, only where the life-tenant is to get nothing; second, a deed of family arrangement and release, clearing up any old matters that need attention, and, engrafted upon it, any necessary indemnities and charges arising out of the present transaction. Such a deed will always be necessary if the life-tenant is restrained from anticipation. If the case is the simplest sort of all, i.e., with a life-tenant who is not restrained and the remainders all vested in persons *sui juris*, all that is necessary is a letter from all the beneficiaries to the trustees directing them to make the payments.

There are a few special points. It will almost always be desirable, unless all the remaindermen are of really mature years and the case is a very simple one, for them to be represented separately from the life-tenant and trustees. If the same firm act as solicitors for the whole family they can instruct different counsel for the various interests. In framing the release one should look rather carefully to see whether it will indefeasibly vest the whole remainder: the trust in default is sometimes for the children of A and sometimes for the children of the marriage of A and B. It should be remembered that a man can have further children till a fairly great age (and, in legal theory, till death), and that even if his present wife is past the age of child-bearing there is always the chance that she will die and he will marry someone else much younger. But, of course, any children by the second marriage, though the children of A, would not be children of *the* marriage (i.e., that of A and B). It is very easy to be caught on this point, which is an important one. I have already drawn attention to one other stock difficulty in these matters, viz., the consequences of a life-tenant being restrained from anticipation. But, on the other hand, it must not be forgotten that a restraint only attaches while the lady is a feme covert, and while she is a spinster, divorcee or widow she can dispose of her life interest freely. In this example I have taken, I have not complicated matters by discussing the effect of the life estate being one on protective trusts. In such a case a forfeiture would certainly be caused by the life-tenant entering into any of the transactions suggested above, as they would all divert into hands other than those of the life-tenant the income ancillary to the capital paid out. It seems to have been held in *Re Stimpson's Trust* [1931] 2 Ch. 77, that a forfeiture would be caused if a life-tenant, entitled out of alienation, consented even to the exercise of the statutory power of advancement, though, as I explained in this column a few months ago, the point is inadequately reported and is not free from doubt.

The essentials of the transaction so far discussed are that the "advance" is asked for by the life-tenant and/or that so far as it is asked for by remaindermen no power of advancement is available. I have considered the purely conveyancing points involved in such transactions without addressing myself to the policy. In the simplest case of all, that is, where the beneficiaries can without the trustees' help bring about a state of affairs in which all the present and future interests are absolutely vested in persons of full age and sound mind free from any restraint on anticipation, the trustees will in the last resort have no option save to do as they are told. But in the vast majority of cases at least some part of the equitable interest cannot be put in this state, and so in all such cases the trustees will have to decide whether they are going to co-operate. This is a decision which will depend entirely on the circumstances, and will not always be an easy one to make. If the trustees do not like the beneficiaries' proposals they will be on strong ground in declining to go beyond any power of advancement that may be available, or, in the case of an "advance" to a life-tenant, beyond making a loan secured on the life interest and an insurance on the life-tenant's life. Even so they will be committing a breach of trust unless the settlement authorises them to invest on such security, though it is difficult to see who could complain unless the policy is allowed to lapse or the insurance company becomes insolvent. In a large case they will be well advised to insist either on a deed of family arrangement with full indemnities or on the leave of the court under Trustee Act, s. 57.

In conclusion it may be desirable to remark on the occasion on which a power of advancement, properly so-called, is exercisable. This is a matter which has always puzzled me greatly. One's whole instinct is to treat "advancement" as a word referable to the application of capital for helping a beneficiary in comparative youth, or at least only in later life on the outset of some new venture. Such an interpretation would be in line with the old cases on "advancement by portion" in connection with the former Statutes of Distribution (see, for example, *Taylor* v. *Taylor*, 20 Eq. 155). It would, however, not be on all-fours with the equitable conception of an advancement, which includes capital gifts by a husband to a wife or a father to a son (though not by a mother to a son), and I think it would be dangerous to build much on analogies to the various other usages of the word "advancement." In fact, a considerably laxer view seems to have been taken of a power of advancement as long ago as *Re Breeds* (1875), 1 Ch. D. 226, where Jessel, M.R., relied on the incidental presence in the wording of the power of the word "benefit" to allow trustees to maintain a beneficiary out of capital. Again, in *Klug* v. *Klug* [1918], 2 Ch. 67, the court allowed trustees to pay out of capital under such a power the legacy duty on a life interest given to a beneficiary, a purely "income" expense. And in *Re Garrett*, *supra*, where the trustees asked whether they might exercise a power of advancement by paying school fees, Clauson, J., did not simply refuse to consider the idea on the ground that such fees were an income expense, but heard in open court argument on quite a different point that arose, and then sent the case back to chambers to be dealt with on its merits. The conclusion, therefore, must be that the power does not apply only to capital expenses, at least where the word "benefit" is present as well as "advancement," as is the case in the statutory power and in most express powers. And it is also not clear that there is anything to confine advancements to youth or new ventures, since that conception of the word's meaning rests on an analogy which is not really applicable. But this power is only one which the trustees *may* exercise: they are in no way bound to do so, and if they feel at all dubious about doing what is asked they should refuse. Such a refusal will not, of course, prevent them from considering on its merits a full-blown scheme for raising the money with ample releases and indemnities, or from going to the court for direction, under s. 57 or otherwise.

Landlord and Tenant Notebook.

WAR DAMAGE: THE DEFINITIONS OF GROUND LEASES, AND MULTIPLE LEASES.

The Landlord and Tenant (War Damage) Act, 1939, makes, in ss. 13-16, special provision for two kinds of leases; ground leases and multiple leases (not being ground leases). Both expressions are defined in the interpretation section (s. 24) but, while the novelty of the whole situation must have made the draftsmen's task somewhat difficult, the results are not, I consider, as happy as they might well have been.

Ground leases, of course, constitute a well-known phenomenon, at all events in many parts of England. The practice of granting long leases of plots of vacant land to builders who undertake, in consideration of low rentals, to erect houses upon them, and who thus become owners of the buildings *pro tanto*, is well established, yet at common law the relationship between the owner of such a lease and the so-called "ground landlord" is exactly the same as that between a weekly tenant paying whatever amount the premises may be worth by the week and his landlord. But "ground lease" is not a term or art; hence the Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (7), recognising as it were, the absurdity of "protecting" the lessee of a large mansion paying perhaps £5 a year—or it might be a peppercorn "if demanded"—made "special provision," and set about its task by drawing the line by reference to the ratio between rent payable and rateable value.

In some respects, the task which the special provisions as to ground leases contained in the Landlord and Tenant (War Damage) Act, 1939, has to perform is similar. That is to say, it was considered that the right to disclaim (and kindred rights) created by Pt. II of the Act ought not be applicable, without some modification, to properties of the kind described in the preceding paragraph. But while the expression "ground lease" is now used, and the result may make for justice, it does not make for clarity. The modifications take the shape of a direction to the court to do what it considers equitable. The leaseholder may not disclaim without leave, which may be granted conditionally; when considering whether to grant leave, the court must have regard to (1) the extent of the war damage suffered by the land comprised in the lease as a whole, and (2) all the circumstances of the case, which are to include length of unexpired term, ratio of rent to annual value, offers by the lessor to extend the term or modify the rent. The conditions, if any, are to be such as the court "thinks fit to impose," specific mention being made of payment of compensation.

One feels that the direction to consider the extent of the war damage suffered by the land comprised in the lease as a whole is regrettable if only because of discrepancy with the main provision for disclaimer in s. 4 (1) which demands simply that *the* land comprised in the lease be *unfit by reason of war damage*. Undoubtedly there may be degrees of unfitness; but must not land be, "as a whole," be unfit, i.e. (s. 24), in the case of buildings, for the purpose for which it was used or adapted for use in any case before a tenant may disclaim?

However, turning to the definition of "ground lease" in s. 24, we find that the expression means "a lease at a rent (or, where the rent varies, at a minimum rent) which does not substantially exceed the rent which a tenant might reasonably have been expected, at the commencement of the term created by the lease, to pay for the land comprised in the lease, excluding any buildings, for a term equal to the term created by the lease."

This will obviously cover peppercorn cases. But it is a pity that the line could not have been more definitely drawn: the "substantially" opens the door to much argument. And then, a good deal of imagination is likely to be exercised, and in different directions, by experts called upon to assess the then prospective value of land at a date which may be before living memory. But what seems to me the most serious objection is this: is the hypothetical tenant to be envisaged as (a) entitled to build, or (b) obliged to build, or (c) neither? Should the witness put himself in the position of a farmer securing some grazing land, or of a speculative builder intent on developing an estate? In this connection, and in connection with my earlier remarks, it may be remembered that if an agreement for a lease uses the expression "ground rent" that will not in itself imply an obligation to grant or accept a "building" lease, as was held in *Wesley* v. *Walker* (1878), 38 L.T. 287. It would presumably absolve him from waste or breach of covenant to deliver up the thing demised, but that is as far as it would go.

It is not surprising that s. 14 creates a right, when a notice of disclaimer or retention or to elect has been served, to apply to the court to determine whether the lease is a ground lease or not. It is, surely, regrettable that an important statute should betray so much uneasiness about describing part of its subject-matter that, while supplying a definition, it hastens to provide machinery for deciding whether the definition applies.

"Multiple lease" is, I think, not only not a term of art, but is actually a new expression. So here I propose to refer to the statutory definition in s. 24 first: "'multiple lease' means a lease comprising buildings which are used or adapted for use as two or more separate tenements." Not, I think, what one would expect: the Oxford Dictionary gives the meaning of "multiple" as "consisting of or characterised by many parts, elements, or individual components; manifold." But let us see what the operative part of the statute provides by way of special treatment for multiple leases.

Section 15 in effect provides for disclaimer in apt cases, "as respects one or more of the separate tenements comprised" in the lease. The lease is then to be treated "as if it were two separate leases, one comprising the disclaimable tenement or tenements, and the other comprising the remainder of the tenements"; and the court gives consequential directions such as it thinks fit, for apportioning rent, etc. It is quite clear that the draftsmen are entitled to a bouquet for not overlooking something which might not have occurred to some of us. But at the same time—brickbats being so much more plentiful than bouquets in this part of the world at present—one does feel tempted to indulge in some adverse criticism of the definition set out above. The special provision is clearly designed to assist the tenant who is sub-tenant of a flat, of an office in a block, of a Harley Street consulting room, and whose neighbours may have suffered but whose own premises remain unscathed or substantially so, and to assist the mesne tenant concerned. This being so, why is "multiple lease" made to mean a lease comprising buildings which are used or adapted, etc.? Parliament cannot have intended to enact that a lessee is to qualify for the benefit of the special provisions of s. 15 only if he holds at least two blocks of flats, offices, etc. I imagine that, when occasion arises, a court will give reasonable effect to the sections either (1) by applying the Interpretation Act, 1889, s. 1 (1) (*b*) "words in the singular shall include the plural, and words in the plural shall include the singular," that is, "unless the contrary intention appears"; I think it does not; (2) or, though the strain will be obvious, by regarding the several flats or sets of offices as so many "buildings," each a "separate tenement."

Honours and Appointments.

Mr. J. H. THORPE, K.C., has been elected a Master of the Bench of the Honourable Society of the Inner Temple.

Mr. Clifford Heyworth, solicitor and Town Clerk of Chingford, Essex, succeeds Mr. E. M. Neave as Town Clerk of Richmond, Surrey. Mr. Heyworth was admitted a solicitor in 1929.

To-day and Yesterday.

LEGAL CALENDAR.

26 May.—Thomas Cæsar was the third son of an eminent Italian physician settled in England, who stood in high favour both with Queen Mary and Queen Elizabeth. He entered the Inner Temple in 1580. Without being called to the dignity of the wig, he was appointed cursitor baron of the Exchequer on the 26th May, 1610, and soon afterwards his Inn called him to its Bench and the King knighted him. He enjoyed his new dignities for but a short time, dying in the following July. His elder brother, who also belonged to the Inner Temple, became Master of the Rolls.

27 May.—On the 27th May, 1935, there opened at the Old Bailey the trial of Alma Rattenbury and George Stoner for the murder of the woman's elderly husband. The boy, for he was really no more, had been employed in the household as chauffeur-handyman, but very soon he had become the wife's lover. The relationship had unbalanced his ill-educated and immature mind, and one evening while his employer was sleeping in his chair he had hit him on the head with a mallet and killed him. At the trial neither of the prisoners sought safety in throwing blame on the other, and in the end the jury decided that Stoner alone was guilty. His death sentence was subsequently commuted, but Mrs. Rattenbury killed herself.

28 May.—On the 28th May, 1794, the thirteen proprietors of the "Northern Star" appeared in the Irish Court of King's Bench charged with seditious libel. The matter arose out of the publication in their journal of a declaration and address by the "Irish Jacobins of Belfast." In forceful terms it had pointed out the defective representation of the nation in Parliament, so that "out of five millions of people ninety individuals actually return a majority of the House of Commons, who, instead of representing the voice of the nation, are influenced by English interests and that aristocracy whose baneful exertions have ever tended to sag the vital principles, the rising greatness and native genius of this unhappy and wretched country." All the proprietors except one, John Robb, the actual printer, were acquitted on the ground that there was no evidence that they had authorised the publication. He was convicted.

29 May.—On the 29th May, 1736, Patrick Henry was born at Studley, in Virginia. His versatile father crowded into his life the functions of county surveyor, colonel and judge of a county court. Patrick having failed twice as a storekeeper and once as a farmer, he was admitted to the bar at the age of twenty-four after a very brief period of preparation. He acquired a very big practice. He became a member of the legislature, and took a prominent part in the opposition to the British Government leading up to the American Revolution. To one of his speeches belongs the famous passage: "Cæsar had his Brutus, Charles the First his Cromwell and George the Third" (cries of "Treason"), "and George the Third may profit by their example! If this be treason, make the most of it." From 1776 to 1778 he was Governor of Virginia.

30 May.—Lord Braxfield died in St. George's Square, Edinburgh, on the 30th May, 1799.

31 May.—One of the preludes to the French Revolution was the scandal of the diamond necklace, an elaborate piece of jewellery worth the cost of two warships. The trouble arose from the credulity of the Cardinal de Rohan, a great nobleman and a charming and ambitious courtier with little clerical austerity. For years he had known the lovely Queen Marie Antoinette to be hostile to him, but Court etiquette prevented him from approaching her to make his peace. In these circumstances he allowed himself to be persuaded by Madame de la Motte, a lively adventuress on the fringe of Court circles, that she had the Queen's confidence. He entrusted her with secret letters to his sovereign, receiving encouraging and indiscreet replies, forged, of course. The height of the fraud came when he was led to believe that the Queen wanted him to buy the great necklace for her, himself advancing the money. Naturally, it never left the hands of Madame de la Motte. When the transaction came to light there was a sensational trial before the High Court, which on the 31st May, 1786, acquitted the Cardinal, and sentenced the adventuress to be whipped, branded and imprisoned for life.

1 June.—On the 1st June, 1649, Robert Nicholas was appointed a Justice of the Upper Bench, as the former King's Bench was called under the Commonwealth. On the Restoration he received his pardon, but was not confirmed in the degree of serjeant-at-law.

THE TEMPLE CHURCH.

To burn a building which has stood for more than eight hundred years is something of a masterpiece of destruction and the flames which consumed the Temple Church during a recent raid fed on no common fuel. Damaged in the Great Fire, though just saved by the energetic blowing up of buildings, it survived till now to perish in our own day. May its spirit find life again in a glorious resurrection. When that time comes it may be hoped that the work done will be better conceived than that executed on the advice of Sir Christopher Wren and other "able surveyors" consulted in 1682; even he had his less happy moments. They so placed the organ as to cut off the Round completely from the rest of the church; raised the floor, thus shortening the visible length of the pillars, and made an all too liberal use of whitewash and plaster.

Our County Court Letter.

Funeral Expenses of deceased Wife.

In two recent cases at Uttoxeter County Court (*Bradbury* v. *Trevor*; *Harley* v. *The Same*) the claims were against a widower in respect of liabilities as regards his late wife, from whom he had been living apart for five years before her death. The first plaintiff was an undertaker, and he claimed £10 1s. as the funeral expenses of the defendant's wife. The second plaintiff was a neighbour who had nursed the defendant's late wife in her last illness, and had provided her with food. The amount claimed was £23 15s. The second plaintiff's case was that she had looked after the deceased on her promise to repay the cost of the proceeds of an insurance policy maturing in 1939. The last sixty-seven payments (of 2s. a week) had been paid by the second plaintiff, who had taken the policy to her solicitor on the death of the deceased. The solicitor had persuaded the defendant to take out letters of administration, in order that the policy money, viz., £75, could be made available for payment of the debts and funeral expenses of the deceased. The balance remaining in the hands of the defendant, after payment of all claims, would be £19 2s. 10d. The defendant's case was that, on being notified of his wife's death, he had signed the following document in the presence of an attesting witness: "I, Douglas Trevor, am not having anything to do with the funeral, and the late Mrs. Beatrice Trevor has no claim on me and I have no claim on Mrs. Beatrice Trevor." His Honour Judge Finnemore gave judgment for the first plaintiff for the full amount claimed, with costs, and for the second plaintiff for part of the amount claimed, viz., £16 4s., with costs. It is to be noted that a husband is liable for his wife's funeral expenses, if the funeral is one suitable to her station in life. See *Bradshaw* v. *Beard* (1862), 12 C.B. (N.S.) 344; *Re MacMyn* (1886), 33 Ch. D. 575.

Liability for Nuisance from Flies.

In *Hampshire* v. *Mountain*, recently heard at Boston County Court, the claim was for an injunction, £50 general damages, and £5 17s. 6d. special damage, viz., medical expenses. The plaintiff's case was that the dumping of debris, including decayed meat, on the defendant's land had caused a plague of flies and a bad smell. The result was that the plaintiff became ill with septic tonsilitis. The defence was a denial that the alleged nuisance had caused the plaintiff's illness. After a view, His Honour Deputy Judge W. Smith observed that the alleged smell had ceased. The claim for an injunction accordingly failed, as that remedy could only be claimed in respect of future occurrences on proof by the plaintiff of imminent danger of apprehended injury. There was no evidence of the presence of decayed meat on the defendant's land, and, if the plaintiff's throat trouble was attributable to decayed meat, she had no claim against the defendant on that account. As regards the alternative allegation that the flies were the cause of the illness, the evidence was that septic tonsilitis was a streptococcal infection spread by flies. No swab had been taken from the plaintiff's throat, however, and no bacteriological test had been made of the debris dumped on the defendant's land. There were too many missing links in the evidence to justify a finding that the plaintiff's illness was due to the flies. The claim therefore failed on that head, but, by reason of the diminution of ordinary comfort, judgment was given for the plaintiff for £22 10s., with costs. Compare *Bland* v. *Yates* (1914), 58 Sol. J. 612, as to nuisance from flies.

Trial of Mare.

In a recent case at Newton Abbot County Court (*Newton Abbot Shire Horse Society* v. *Weeks*) the claim was for £3 7s. in respect of the trial of a mare. The case for the plaintiffs was that, after the trial of the mare, a groom had asked the defendant to sign the book. The words written were: "T. W. H. Weeks, Undown, Holloway Farm, Kennford." The defence was that no proper trial had been carried out, and the signature was not the defendant's. The initials were those of one of his sons. His Honour Judge Thesiger observed that the defendant had not suggested, at the first opportunity, that the initials were those of his son. The evidence that the defendant had signed the book was accepted. The insertion of his son's initials may have been a device whereby the defendant hoped to evade payment for what he regarded as an inadequate trial. As the book had been signed, to the effect that a trial had in fact been made, the question of its adequacy did not arise. Judgment was given for the plaintiffs, with costs.

The Commission of Advertising Agents.

In *Albert E. Smith (Printers) Ltd.* v. *Walter* recently heard at Gloucester County Court, the claim was for £9 6s. 4d. for printing work done, and the counter-claim was for £16 8s. for commission. The claim was admitted, and the defendant's evidence on the counter-claim was that the plaintiffs had tendered for the printing of a monthly magazine, and their tender was accepted on the defendant's recommendation. The value of the contract for printing was £26 a month, and the magazine was published for six months. The usual commission for an advertising agent was ten per cent., and the defendant was therefore entitled to the amount claimed. The defence was that no question of commission had been raised until the defendant was pressed to pay his printing bill. Moreover, he had already received payment in respect of advertisements appearing in this magazine. His Honour Judge Kennedy, K.C., gave judgment for the plaintiffs on the claim and counter-claim, with costs.

Notes of Cases.

KING'S BENCH DIVISION.

Bourne v. **Mendip Concrete Co., Ltd.**

Humphreys, Tucker and Oliver, JJ. 17th January, 1941.

Factory—Dangerous machinery—Workman injured by approaching dangerous part in improper manner—Dangerous part not otherwise likely to be approached—Occupier liable—Factories Act, 1937 (1 *Edw.* 8. *and* 1 *Geo.* 6, *c.* 67), *s.* 14.

Appeal by case stated from a decision of Frome (Somerset) justices.

The respondent company were charged with having, as occupiers of a factory within the meaning of the Factories Act, 1937, on the 1st March, 1940, contravened s. 14 of that Act in that the toothed wheels driving the rolls of a stone-crushing machine were not securely fenced. A second information alleged that in consequence of that contravention one Payton suffered bodily injury. The crushing machine consisted in part of two rolls, to which cracked stones were fed by a conveyor belt. The rolls were driven by two cogwheels at the side of the machine. The wheels were 18 inches in diameter, were geared to one another, and rotated inwards in a vertical plane at 50 revolutions per minute. The nip between the two wheels was at their highest point of contact. The wheels, and particularly the point of nip, were dangerous parts of machinery. No immediate fence protected the wheels, but some 5 feet 6 inches from the wheels there was a wall, which opposite to them was 9 feet high. That wall was met by a wall intended to be 3 feet 9 inches high when completed, but which on the material day was still so low that a man could easily step over it. The wheels could be approached by a plank 18 inches wide crossing a pit. The walls and pit formed a remote fence guarding the wheels, but there was nothing to prevent anyone from approaching them by stepping over the dwarf wall and crossing the plank. The nip of the wheels was some 26 inches above the plank. On the day in question Payton was helping a fellow employee to feed stone into the machine. The machine was not running properly, and Payton had strict instructions that if anything went wrong he was to stop it and summon the manager. He nevertheless entered the space between the machine and the walls in order to make an adjustment to the conveyor with an iron bar. After he had stepped back on to the plank, his coat was blown open by the wind and became caught in the cogwheels, and he was fatally injured. If there had been a fence over the wheels the accident would not have happened. Payton had no right to attempt to make the adjustment in question to the conveyor. It was contended for the respondent company that the wheels were not dangerous because no one would reasonably have expected danger to result from them, and that they were as safe as if they had been securely fenced. Reference was made to *Blenkinsop* v. *Ogden* [1898] 1 Q.B. 783; *Davies* v. *Thomas Owen & Co., Ltd.* [1919] 2 K.B. 39; *Atkinson* v. *L.N.E. Railway Co.* [1926] 1 K.B. 313, 42 T.L.R. 29; *Hindle* v. *Birtwhistle* [1897] 1 Q.B. 192. The justices held that the wheels were not so dangerous as to require fencing, and dismissed the informations. The inspector appealed.

Humphreys, J., said that this was another case where justices had before them facts showing machinery to be dangerous in the sense that if anyone approached it while it was in motion he would be liable to be injured. The justices had before them the further fact that this workman while at work had come into contact with the cogwheels and lost his life as a result. The court should approach matters of this kind with all respect for the local justices on the questions of fact. If they had clearly found that the particular piece of machinery was not dangerous, he (his lordship) would hesitate before remitting the case to them merely because, on the facts, which were for them, he thought differently. None, however, looking at the photographs attached to the case could doubt that the cogwheels were extremely dangerous, as the justices had stated in their case. In view of the requirements of the Factories Act with regard to the fencing of dangerous parts of machinery, it was nothing to the point to say that, the machinery being where it was, it was unlikely and improper that any workman should be close to it in his work; the Act had been passed in the interests of foolish, not wise, workmen. Such a finding might be material in an action against the occupiers of the factory by the relations of the deceased workman; it was immaterial for the purposes of the Act of 1937. The answer was that on the facts of the case the machinery was not as safe as if it had been securely fenced, for the justices had found that the accident would not have happened if the cogwheels had been fenced. In those circumstances the case was plain. The justices had misdirected themselves on their own findings of fact in holding that this machinery was not dangerous for the purposes of the Act because it was unlikely that anyone would approach it. The case must be remitted to them with a direction to convict.

Tucker and Oliver, JJ., agreed.

Counsel: *Valentine Holmes*. There was no appearance by or for the respondents.

Solicitor: *The Treasury Solicitor*.

[Reported by R. C. Calburn, Esq., Barrister-at-Law.]